



Generally Speaking

Comings and Goings

Eric Aarseth was appointed this month to the Anchorage superior court. Eric worked in the Department for nearly 12 years; he began in the Criminal Division and spent the past four years working in the Torts and Workers' Compensation section. In addition to missing Eric's valued advocacy skills, the Torts section now has a vacancy in its Minnesota Vikings fan club.

Steven Bookman joined the Anchorage Child Protection section to handle CINA cases. Steven was born and raised in Anchorage and was most recently an associate at Guess and Rudd.

Jessica Bublitz, one of our two Bethel CINA attorneys, had a baby girl. Congratulations!

Wayne Cary joined the Anchorage Child Protection section and will be our Nome AAG, handling CINA cases in Nome and Kotzebue. Wayne comes to us from Alabama, but previously worked for OPA, the PDs, and Cooke, Roosa and Valcarce in Bethel.

Deb Eisele joined the Kenai DAO to fill a newly-created paralegal position. Deb was formerly the director of the Kenai women's shelter for ten years.

AAG **Zach Falcon's** last day in the Juneau Natural Resources section was December 23. Zach left Juneau to move to the lower 48.

Don Hazel transferred from his position as IT Manager to the Governor's Office. Drew McDougal has taken over as Acting IT Manager.

Chris Kennedy's last day with the department was December 23rd. Chris was acting supervisor of the Environmental section. He is now the Deputy Chief Administrative Law Judge at the Office of Administrative Hearings.

Vicki Kerr joined the Kenai DAO. Vicki was formerly in the insurance field and has most recently been a stay-at-home mom for her two children. Now that they are school age she has chosen to return to the work force to fill a newly created law office assistant position.

Steve Mulder was promoted to the position of Statewide Section Chief of the Environmental section. Steve has been with the department since September 2002.

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Labor and State Affairs is delighted to have **Margaret (Mags) Paton Walsh** join the section in a new position advising the Workers' Compensation Appeals Commission and the Division of Motor Vehicles. While attending Harvard Law School, Mags was a summer intern in the Environmental section and is the first intern who has returned to work for us after graduation.

Patricia Runyan, LOA II for the Torts and Workers' Compensation section in Anchorage, has been promoted to a paralegal position in the Child Protection section. Patti worked in Torts for 6½ years and contributed greatly to the excellent work product of the section. Although she will be greatly missed in the Torts section, her new position moves her in the direction of her ultimate career plans.

Beth Russo returned to work in the Anchorage Child Protection section on December 27 after a leave of absence after the birth of her son. Congratulations Beth, and welcome back.

Much to the Kenai DAO's regret, **Heather Seidner** left the department to return home to Michigan.

Tom Slagle is now under contract with the department to handle the prosecution side of the Juneau Therapeutic Court. Tom retired a year ago from the Civil Division where he was in the Juneau Torts section.

Rick Svobodny has just moved into his new position as Cold Case Prosecutor in OSPA and is no longer in the Juneau DAO.

CIVIL DIVISION

Child Protection

Litigation

Native Village of Tanana et. al. v. State, 3AN-04-12194 CI. Alaska Native villages in Central and Southwest Alaska brought this suit against the

Attorney General and state agencies to challenge the legal conclusions contained in a 2004 formal opinion. The state filed a motion to dismiss the case on ripeness grounds. The trial court denied the motion and we filed a petition for review. Senior AAG Dan Branch represents the state in this case.

WJ v. State. The father in this CINA case is asking the Alaska Supreme Court to reverse an order terminating his parental rights. The case raises the issue of whether social workers have to provide services to a non-native putative father before paternity is established. Dan Branch is handling this appeal.

New CINA Cases

The section opened many Child in Need of Aid (CINA) cases as a consequence of the Office of Children's Services (OCS) becoming involved or taking custody of children discovered in unsafe circumstances.

In several cases, the children came to OCS through APD. For example, OCS took custody of a two year-old after the mother told neighbors and police that she wanted to go out drinking and was unwilling to care for her child. The mother reported to police that she had already consumed 12 beers. In another case, two individuals reported they had seen a father touching his daughter in a sexually inappropriate manner. When the officer arrived at the home, the daughter was visibly distraught, the father was highly intoxicated and bleeding on the head, and 10 other adults were in the home, most of them intoxicated.

Drugs or alcohol was a factor in several cases. In one instance, a child was born with amphetamines, methamphetamines and marijuana in her system. Because of the mother's use of methamphetamines, OCS determined she could not safely care for the infant. Two other children were taken into custody when it was determined that their mother was using drugs in their presence. Another four children were taken into

custody after their mother gave birth to a cocaine positive child. While being transported for a DUI, a woman indicated that her children were home alone. Police responded to the home and found five children age 2 to 11 home alone.

OCS took custody of several children because of assaults by their caregivers. An infant died as a result of a head injury caused by the child's mother. The child's two year-old sibling was taken into custody as a result. A 12 year-old child was taken into custody after reporting that his father had physically abused him. A six year-old in a remote area went to school with blood on her lip and on various parts of her clothing, alleging her father had caused her injuries.

Neglect was the basis of some of the other cases. For example, OCS took a five year-old child into custody after learning that the boy had been left alone in his apartment and was crying for his mother. When police investigated, the child was found alone. The mother later acknowledged that she had been out drinking, and did not return home until 1:30 a.m. In another case, an infant was taken into custody for failure to thrive. The child was medically fragile and had been born with cocaine and marijuana in her system. The mother placed the child with a friend when the child was two weeks old and has had very little contact with her since. Another infant from a remote location was taken into custody because her parents refused to follow medical advice about conditions that were life-threatening and may have caused the child to go blind. OCS also took the children of a mentally ill mother who stopped taking her medications, lost her job, and was evicted from her home. Before she left, there was no heat or food in the home. In a separate case, six children between nine months and 10 years old were left home alone while their mother worked. When law enforcement and OCS investigated, they found the home was completely void of any edible food or sanitary supplies for the infant. The front window was completely missing and there was a large exposed hole in the floor of the bedroom where

the children were huddled because it was the opening to a heat vent.

Miscellaneous

Last month a superior court judge allowed some children to return to the home of the parents because the parents agreed to pay for and wear ankle monitors that monitored their blood alcohol level 24 hours a day and reported any consumption to the company owning the ankle monitor. Shortly after the children returned home, the father drank on the job and the ankle monitor alerted the company, which alerted OCS. The judge ruled that Dad's confirmed alcohol consumption on the job warranted an order that would give OCS physical custody of the children if the father did not move out of the house. The mother had remained sober, so the children remained in her care.

OCS learned that a father had been receiving state-assisted housing because he claimed he had his children in his care when they were actually in foster care. AAG Alicia Porter is currently attempting to get a court order authorizing release to the housing authority of the information that the children are in foster care.

AAG Laura Bowen, with the help of paralegal Sharon Stein, LOA Dana Cupp, and OCS staff, prepared for an adjudication trial in only four days. As a result, a child with a potentially fatal kidney disease is now removed from the parents who were not properly treating the disease.

AAG Shanna Johnston had her first appearance before the Alaska Supreme Court with 1 1/2 hours notice. We had filed a Notice of Appeal and a Motion for Stay in a case in which the superior court judge had ordered unsupervised visitation between parents and a young child, which OCS perceived would be dangerous for the child. Chief Justice Bryner gave notice at 10:00 a.m. on the Friday before Christmas that he wanted oral argument on the motion at 11:30. Despite the fact that Shanna had so little notice and that Justice Bryner had some difficult

questions for her, she did a great job. While Justice Bryner did not grant the stay, he found that the superior court would not have had authority to order unsupervised visitation without a hearing and a showing that OCS was abusing its discretion.

Gayle Garrigues arranged for representatives of the AST drug enforcement unit to provide a three-hour training regarding drugs with an emphasis on meth. She and 22 social workers attended. AST set up a meth lab and demonstrated the "sights and smells" of the lab, and had samples of the various component chemicals and devices used in the manufacture of meth. They also did a "show and tell" about other illicit drugs.

Gayle also provided training to social workers in the Northern Region as well as in Nome and Kotzebue about HB 53 (Children in Need of Aid/Adoption/Guardian).

Collections and Support

In December, the Alaska Supreme Court issued three opinions in child support cases.

***John v. Baker (John III)*, Supreme Court No. S-11176 (December 16, 2005).** This case had the potential to resolve the issue of whether tribal courts in Alaska (except for Metlakatla) have jurisdiction to enter child support orders. The Court declined to address this issue, finding that the tribal court order in this case was not a child support order.

In its analysis, the Supreme Court determined that its previous decisions in *John I* and *John II* did not require the state superior court to refer support issues to the tribal court; *John I* and *John II* only addressed child custody. The Supreme Court determined that the state superior court did not refer support to the tribal court; the state superior court only referred child custody to the tribal court. Finally, the Supreme Court determined that the tribal court did not issue a child support order. The tribal custody order

directed the parents to "help each other financially." Thus, the Supreme Court held that the state superior court properly ruled that it retained jurisdiction over child support.

This case was briefed by AAGs Diane Wendlandt, Paul Lyle and Robert Nauheim.

***Lloyd C. Allen v. CSSD*, Supreme Court No. 10476 (December 16, 2005).** The *Allen* case involved an obligor's challenge to a superior court's ruling on his motion to modify child support and its ruling on his appeal of CSSD's decision to report his delinquent arrears to a credit bureau. The case also addressed several related constitutional and procedural points. The Court affirmed the superior court's rulings, deciding in favor of CSSD on all issues. The key points were that (1) Civil Rule 90.3 allows the court to calculate child support on an unemployed obligor's income producing assets, (2) disability payments are considered income for child support, (3) CSSD is required by federal law to report delinquent arrears under certain conditions, and CSSD rightfully complied, (4) CSSD did not violate the obligor's due process right to be heard in a meaningful time even though there were appreciable delays by the agency and the superior court, and (5) AS 25.27.194, which requires the government to "use its best efforts" to process modifications of support orders is not unconstitutionally vague as applied to this case.

This case was briefed by AAG Diane Wendlandt (now with the Office of Special Prosecutions and Appeals).

***Jonna Bartlett v. CSSD*, S-11271 (December 16, 2005).** *Bartlett* is an interstate child support case. The Alaska Child Support Services Division was attempting to register an Alaska child support order in Arizona so that child support arrears could be collected from an Arizona employer. The obligor father lived in Arizona and he contested the registration of the Alaska order in Arizona. He claimed he had not been properly served with the notice of modification resulting in

modification of the Alaska order. The Arizona court ruled that the Alaska court did not have jurisdiction to modify its own order in 1993 due to service defects on the obligor father and, therefore, the Alaska court lacked personal jurisdiction over the father.

Because of the Arizona ruling, CSSD sought to vacate the Alaska order under 60(b), the Uniform Interstate Family Support Act and the federal Full Faith and Credit for Child Support Orders Act. The superior court in Alaska vacated the 1993 Alaska order and the custodial parent appealed that order.

The Alaska Supreme Court decision considered whether collateral estoppel barred the custodial parent from challenging the Arizona court decision in Alaska. The Alaska Supreme Court held that an exception to the collateral estoppel rule applied to the facts of this case and that Alaska should not give preclusive effect to the Arizona declaration that the Alaska order was void due to lack of personal jurisdiction. It reversed the Alaska court order vacating the 1993 modified child support order and remanded for further proceedings.

This case was briefed by AAG Kevin Williams.

[Commercial and Fair Business](#)

Consumer Protection/Anti-Trust

Consumer Protection Unit Speaks to American Society of Industrial Security on Consumer Scams.

AAG Ed Sniffen gave a presentation to the American Society of Industrial Security (ASIS) to discuss common consumer scams in Alaska. The ASIS is composed of security professionals from a variety of industries, including state and federal law enforcement, corporate security officials, and investigators. The presentation focused on advanced fee fraud, investment fraud, work-at-home and seminar scams, and identity theft, including discussion of how to recognize the common themes in these scams. About 25 members of the organization attended.

State Files Lawsuit Against Merck Over Marketing and Sale of Vioxx. The state filed a lawsuit in Alaska Superior Court against Merck and Co. that alleges Merck violated Alaska's consumer protection laws when marketing and selling Vioxx, a once popular medication commonly prescribed for osteoarthritis, the management of acute pain in adults, and the treatment of primary dysmenorrhea. The complaint alleges that Merck knew of potential side effects of taking Vioxx, but failed to disclose this information to the FDA when seeking approval of the drug, and to doctors who prescribed the drug. The state is being represented by the Lanier Law Firm, a firm based in Texas that successfully prosecuted a plaintiff's cases in Texas for a Vioxx user who died eight months after taking the drug, and obtained a \$250 million verdict.

Occupational Licensing (now the Division of Corporations, Business and Professional Licensing)

Hearings

On December 8-9, 2005, a disciplinary hearing involving Ketchikan real estate appraiser Kim Wold occurred in Anchorage. A certified real estate appraiser in Alaska can be disciplined for failing to comply with the Uniform Standards of Professional Appraisal Practice (USPAP) and the Division of Corporations, Business and Professional Licensing (Division) presented evidence of multiple USPAP violations with regards to three appraisals performed by Wold. The evidence is disputed by Wold; additionally, rebuttal witnesses and closing arguments have yet to be presented to the administrative law judge. On December 2, 2005, six days before the hearing began, Wold filed a declaratory judgment action in Ketchikan superior court, seeking a temporary restraining order and preliminary injunction staying the disciplinary proceeding because of the alleged unconstitutionality of the disciplinary statutes at issue. On December 6, 2005, after oral argument, Judge Thompson denied Wold's motion for stay, based on the doctrine of exhaustion of

administrative remedies. AAG Robert Auth represented the Division at hearing and in the declaratory judgment action.

On November 29, 2005, a disciplinary hearing involving Anchorage mobile intensive care paramedic Kurt Sorensen took place in Anchorage. The Division of Corporations, Business and Professional Licensing (Division) presented undisputed evidence that Sorensen was convicted in January 2005 of misconduct involving a controlled substance in the fourth degree, a Class C felony, which is a basis for discipline by the State Medical Board. The case was heard by an administrative law judge and a proposed decision is expected in the next few months. AAG Robert Auth represented the Division in this proceeding.

Insurance

AAG Nick Atwood received a favorable decision in an administrative appeal involving *Daniel W. Pinkerton v. Division of Insurance* – Case No. 3AN-04-11373 CI. The case centered on allegations that Mr. Pinkerton had violated various sections of Alaska's insurance code, by holding himself out as a financial planner and using that position to generate substantial commissions for himself on the sale of insurance products. Anchorage Superior Court Judge Mark Rindner agreed with the state's arguments and affirmed the Director's determinations that Pinkerton had violated: 1) AS 21.36.145 by failing to fully disclose his commissions; 2) AS 21.36.030 by misrepresenting the suitability of a life insurance policy to pay estate taxes with the estate named as the beneficiary; and 3) by misrepresenting the suitability of a universal life insurance policy for four young children.

Division of Investments

In *Chilkoot Lumber Co. v. Rainbow Glacier Seafood*, the case where the Div. of Investments intervened to protect its interest in equipment being held by Chilkoot Lumber, Judge Thompson granted ADI attorney's fees of \$2,471. He also

indicated that once ADI intervened it became a "party" (something Chilkoot kept arguing had not occurred) and that it was the prevailing party on the issue of whether Chilkoot's landlord's lien trumped ADI's UCC-1 financing statement which was filed long before the landlord lien even arose. Chilkoot argued the judge should not grant fees yet until the trial between Chilkoot and Rainbow was concluded. AAG Mary Ellen Beardsley is representing the Division of Investments in this matter.

AAG Mary Ellen Beardsley had oral argument before the Ninth Circuit Court of Appeals in Seattle on December 5th in the case of *Sea Hawk Seafoods v. SOA, Division of Investments*. The issue was whether the bankruptcy court had jurisdiction to determine the scope of a settlement agreement approved by the bankruptcy in the VFDA bankruptcy. Sea Hawk and the State were the primary creditors in that bankruptcy case: Sea Hawk having a \$2.5 million judgment against the debtor and the State having loaned over \$8 million dollars to the debtor. The debtor and Sea Hawk reached a settlement regarding the judgment, which was approved by the State and which was funded with assistance from the State. The State's position was that the settlement agreement covered any and all claims of Sea Hawk against the State. The Alaska Courts asked the Bankruptcy Court for a determination of the scope of the settlement agreement. Sea Hawk argued that the bankruptcy court did not retain jurisdiction to hear this issue, and that the matter was not a related to proceeding and, therefore, the bankruptcy court did not have jurisdiction to hear the matter.

Human Services

Litigation

The section continues to have an unusually heavy litigation case load. We have fourteen 601 appeals in various stages of briefing and five superior court litigation cases related to Medicaid and Temporary Assistance. This section is not usually involved in much litigation so this has

created work load issues for the section, but we are managing. There are a number of pending dispositive motions that will be argued in the next six weeks so we are hopeful that we can trim these numbers down.

Subrogation/Liens

As of December 19, 2005, AAG Tim Twomey and Paralegal Kathey Virgin had 439 open, unresolved files and 174 closed files. Between December 1, 2005, and December 19, 2005, we collected \$51,576.01. We are awaiting payment on an additional \$413,991.70 for matters that have been resolved. For year 2005 to date, we have collected a total of \$998,588.56 for an average collection on a per-claim basis of \$5,739. Tim and Kathey are still working out the kinks in the section in terms of how to process information received from recipients but they continue to recoup dollars and the transition of this program into DOL has been a success.

Medicaid

AAG Blair Christensen has initiated bi-monthly meetings with the Division of Senior and Disability Services to work on fair hearing issues (Medicaid appeals). This client contact should show dividends in hearing testimony and documentary evidence so that the Division is not unintentionally creating litigation issues. She has had two meetings so far and they have been well received.

Licensing

Chief AAG Stacie Kraly conducted a statewide training on Senate Bill 125 (Centralized Licensing). There were approximately 75 in attendance, mostly licensing workers but there were a few from the DHSS Commissioner's office as well. The training was held in Anchorage, with video conferencing in Juneau and others in outlying areas participating by teleconference. The training was well received by both the staff and the administration of DHSS.

Regulations

The section continues to have a steady diet of regulation work from DHSS related to Medicaid and licensing.

Labor and State Affairs

Education and Early Development

Bickford v. Department of Education and Early Development. This month the state filed its appellee's brief in this dispute over DEED's inaction following a letter Ms. Bickford sent in 1998 purporting to complain on behalf of 12 children, their families, and others similarly situated that the Anchorage School District did not properly evaluate for special education. AAG Neil Slotnick is representing the State in this case.

In re Fairbanks North Star Borough School District Funding Decision. A hearing officer denied a school district's appeal from a Department of Education decision that seven children did not meet the criteria for intensive funding under 4 AAC 52.700, which provides a school district with five times the normal state funding to educate qualifying children. As the hearing officer summarized the regulation, "intensive special education funding is only available in the extreme and thankfully rare case in which a severely disabled child cannot be educated absent constant attention, supervision and instruction by qualified staff." AAG Neil Slotnick represented the State.

Elections

Citizens for Ethical Government, William F. Fulton, Richard A. Sutton and Michael Busey v. State of Alaska, Division of Elections (challenging the refusal to certify an application to petition for the recall of state Senator Ben Stevens). Plaintiffs seek certification of the application so that they can circulate the recall petition for signatures. This month the state filed its answer. On December 15, Judge Stowers granted Sen. Stevens's motion to intervene as of right and set

an expedited briefing schedule on the merits of the case. The parties filed simultaneous cross motions in support of their positions on December 23, and simultaneous oppositions on 12/29. Oral argument was held on January 4. AAG Mike Barnhill is representing the State in this case.

Health and Social Services

State v. Covansys. The state settled its action for breach of contract, which was set for hearing in the Office of Administrative Hearings. The dispute was over Covansys's design of a computer system to coordinate benefits delivery for daycare licensing and referral and child welfare. AAG Anne Johnson represented the State in this case.

Motor Vehicles

Saltz v. State, Division of Motor Vehicles. On December 23, the Alaska Supreme Court issued an opinion affirming the administrative hearing officer's conclusion that the trooper had reasonable suspicion to conduct an investigatory stop of Saltz's truck, based on information provided in a REDDI (Report Every Drunk Driver Immediately) and thus affirmed the license revocation. AAG Judith Crowell represented the State.

PERS and TRS v. Gallant. Briefing before the Alaska Supreme Court concluded this month in this equal protection challenge to the cost of living increment paid to retirees residing in the state after retirement. AAG Neil Slotnick is representing the State in this case.

Workers' Compensation Appeals Commission

Levine v. Republic Parking Systems, Twin City Fire Insurance, and the Commission. On December 19 in Fairbanks Superior Court, this new legal challenge was filed against the commission. Plaintiff Levine argues that the act creating the Commission (Ch. 10 SLA 2005) applies only to injuries occurring after the effective

date of the act, interferes with a vested contractual right to appeal a compensation decision in superior court, and violates equal protection because it does not provide the same appellate procedure for all administrative claims. Mr. Levine further argues that the commission is an unconstitutional executive branch court and that the Commission's stay of his board award for costs and attorneys' fees violates the law. AAG Mags Paton Walsh is handling this case.

Special thanks to Gina Ragle for her work on special retirement and benefits-related projects this month and to all of the volunteers on the holiday committee (including Kelly Gamble and Brenda Page from this section) who made this year's party a great success.

Legislation and Regulations

During December, the Legislation and Regulations Section spent an active month editing draft legislation for consideration by the governor for the 2006 legislative session.

The section also performed legal review of several regulations projects including (1) Department of Health and Social Services (certificates of need for health care facilities; incontinence supplies fee schedule; hearing services, durable medical equipment, prosthetics, and orthotics; interim assistance for adult public assistance recipients); (2) Board of Examiners in Optometry (miscellaneous amendments); (3) Department of Environmental Conservation (safe drinking water); (4) Alaska Oil and Gas Conservation Commission (permits to drill and well branches); (5) State Board of Education and Early Development (school and district assessment and accountability; highly qualified teachers and special education); (6) Alaska Commission on Postsecondary Education (student loans); (7) Department of Administration (DMV waivers of road test requirements); and (8) Department of Natural Resources (water management fees).

Natural Resources

State Prevails In Navigability Appeal Before IBLA.

On December 2, 2005, AAG John Baker received a favorable decision from the IBLA in *State of Alaska*, 167 IBLA 250 (Dec. 2, 2005). This appeal involves a significant dispute with the Bureau of Land Management over BLM's survey methods in distinguishing uplands from submerged lands for purposes of computing ANCSA corporations' acreage entitlements. In this case, BLM had purported to include for final conveyance (and acreage charge) to Ahnna, Inc., islands within the Copper River, without adequately determining whether the land now constituting the islands was submerged on Jan. 3, 1959, the date of Alaska Statehood.

Under the Equal Footing Doctrine, title to land below the ordinary high water mark (OHWM) vested in the State of Alaska at Statehood. BLM therefore would have no authority to convey such land. BLM had argued that the State's appeal was untimely, because we never challenged the 1996 survey plat which depicted the land in question as above the OHWM. However, as the IBLA noted in its decision, the 1996 plat was subject to an express disclaimer that it did not purport to transfer any interest to which the State was entitled under the Equal Footing Doctrine. Thus, the IBLA concluded, the State had no reason to appeal the survey.

This is a significant ruling, as BLM's position would have rendered the plat disclaimer language useless. The IBLA reviewed the analysis of DNR Survey Chief Gerald Jennings in detail; noted that BLM apparently had not reviewed pre-1978 aerial photography; and concluded that the evidence "does not support BLM's implicit determination that the islet in question was an "island" at the time of Alaska Statehood." The decision has been set aside and remanded to BLM to consider the evidence provided by the State.

State Settles with Diving Exploration Company Over Fate of Historic Sunken Steamship SS Aleutian. On December 2, 2005, the state

settled a federal lawsuit with Shoreline Adventures, LLC, involving the fate of the SS Aleutian, an 1898 steamship that sank off the coast of Kodiak in 1929. The Aleutian sank in 220 feet of water and lodged on the seafloor intact.

This lawsuit began in 2003. The agreement dismisses the current appeal in the Ninth Circuit and allows the U.S. District Court to maintain jurisdiction over the shipwreck to monitor the terms of the settlement. AAG John Baker represented the state in this case.

Patton v. State. On November 23, 2005, U.S. District Judge Ralph Beistline granted the State's motion for summary judgment in *Patton v. State, CFEC*, No. A04-0226 CV. In this case the plaintiff claimed a federally-guaranteed aboriginal fishing right to commercially harvest salmon in Alaska waters free from the requirements of the Alaska Limited Entry Act, AS 16.43. *et seq.* Citing *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), Section 4 of ANCSA, and *Totemoff v. State*, 905 P.2d 954 (Alaska 1995), the court ruled that Patton's claim was "foreclosed by controlling authority." Patton has appealed to the Ninth Circuit Court of Appeals. The CFEC intends to move for summary affirmance in that court. AAG John Baker represents the CFEC in this case.

Alaska Board of Fisheries

AAG Steven Daugherty started the month out by attending a regulatory meeting of the Alaska Board of Fisheries in Valdez dealing with Prince William Sound and Copper River finfish fisheries. AAG Daugherty provided legal advice on a number of issues, including matters related to the implementation of the state subsistence law and on the Board's limited authority relating to hatchery production. Significant actions taken by the Board included a vote to continue to rely on its 2003 negative customary and traditional use determination for the Chitina subdistrict dip net fishery, and a vote to adopt a new regulatory restriction limiting commercial fishing near the

mouth of the Copper river during the first two weeks of the season.

Vanek v. State. On December 12, AAG Steven Daugherty filed a motion to dismiss for failure to state a claim in which relief can be granted in a new class action lawsuit, *Stephen Vanek et. al. v. State, Board of Fisheries*, 3AN-05-12647 CI, filed by Arthur Robinson. The Plaintiffs allege that regulations of the Alaska Board of Fisheries affect an impermissible taking of the access value of their CFEC limited entry permits and shore fishery leases. By statute, a CFEC permit is only a use privilege that may be modified or revoked without compensation, and that is subject to Board regulation. Similarly, by statute, a shore fishery lease conveys “no interest in the water above the land or in the fish in the water.” Plaintiff’s opposition to the motion to dismiss is due on January 27, 2006.

Olson v. State. The Ninth Circuit Court of Appeals issued a favorable decision in the lawsuit *Nansen Olson and Dana Olson v. State, Department of Natural Resources* handled by AAG Sabrina Fernandez. The Ninth Circuit held that the district court properly concluded that Dana Olson’s motion, filed under Fed. R. Civ. P. 60(b)(6), in an attempt to reopen a case closed over six years ago, failed to demonstrate extraordinary circumstances.

Oil, Gas and Mining

Northstar Pipeline Settlement. On December 9, 2005, the State signed an agreement with British Petroleum Transportation (Alaska) (“BPTA”) settling the parties’ dispute over BPTA’s intrastate tariffs for the Northstar Oil Pipeline (“NOP”). Under the agreement, BPTA will calculate its intrastate tariffs applying the same methodology used to calculate its interstate tariffs for the NOP. The interstate methodology was approved by the Federal Energy Regulatory Commission in 2003. The State agrees not to protest or otherwise challenge the intrastate rates as long as they are at or below the rates calculated in accordance with the settlement methodology. The State and

BPTA have submitted the proposed intrastate settlement to RCA for approval. Within 15 days of the RCA’s approval of the settlement, BPTA will refund, with interest, any amounts collected for intrastate transportation on the NOP during 2004 and 2005 above the interest rate, to the intrastate shippers. AAG Tina Kobayashi represented the State in this case.

Protest at the FERC. On December 14, 2005, the Oil, Gas and Mining section filed a Protest and Complaint of the TAPS Carriers’ 2006 maximum interstate tariff filings at the FERC. The Protest in part simply carries forward the State’s December 2004 Protest/Complaint of the 2003, 2004 and 2005 TAPS interstate tariffs on the grounds that they unlawfully discriminate against interstate carriers -- based on the nearly \$2 per barrel delta between the interstate and intrastate rates for substantially identical services. In addition, the December 2005 Protest/Complaint challenges the prudence of the TAPS Carriers’ expenditures on the on-going Strategic Reconfiguration project, based on recent information that shows currently projected project costs to be \$200 - \$300 million over the planned \$250 million total budget and a year late on the planned December 2005 completion date. We are seeking removal of imprudently incurred costs in calculation of TAPS interstate tariffs for 2004, 2005, and 2006. We expect that the 2006 discrimination claim will be consolidated with the ongoing proceedings on the 2003, 2004, and 2005 tariffs, that are set for hearing at the FERC in May and June of this year. The prudence issues will likely be litigated in a separate proceeding, and thus will provide the section with continuing challenges in FY 2007. AAGs Phil Reeves and Jan Levy represent the State in this case.

Opinions, Appeals and Ethics

For ethics matters, most of the work we do and advice we give is confidential by law. However, we can disclose that, in addition to work on other confidential ethics matters during December, we provided advice to three former state

employees about the Ethics Act's restrictions on their employment after leaving state service. In addition, we gave a presentation on the Ethics Act's requirements to the Department of Administration's commissioner, deputies, and division directors.

AAG Megan Webb filed a brief on behalf of the Office of Children's Services in *W.J. v. State*, a child in need of aid case in which the father challenged the order terminating his parental rights. The legal issue involved in the appeal was whether the trial court erred in terminating the father's parental rights based on conduct by the mother that endangered the child. The State's position is that there was sufficient evidence upon which the trial court could have found that the child was in need of aid based on the father's neglect and abandonment and that the father failed to remedy such conduct.

Megan Webb also filed a brief on behalf of OCS in *M.A. v. State*, a child in need of aid case in which the father is challenging the termination of his parental rights to his youngest child. The father argues on appeal that he remedied his conduct (alcoholism, domestic violence) so his rights should not have been terminated. The State's position is that the father failed in a timely manner to remedy his conduct since he engaged in a violent assault against the child's mother six months before the termination trial, criminal charges for this incident were still pending, and although he had completed a substance abuse treatment program, he had not demonstrated that he could remain sober outside of a structured treatment program or out of the custody of the Department of Corrections.

In addition to working on appellate briefs, AAG Mike Hotchkin assisted the Child Protection section in pursuing extraordinary relief for a child in state custody who was at risk of harm. The trial court ordered the Office of Children's Services to provide a toddler's parents unsupervised visits with her, despite psychological evaluations of both parents recommending against unsupervised contact, and despite the department's concern that

the parents would use the opportunity to flee the state with the child. On extremely short notice, Mike prepared an appeal from the trial court's order, filed an emergency motion to stay the order in the state supreme court, and appeared at an unscheduled oral argument before the supreme court (with the Child Protection section attorney).

Regulatory Affairs & Public Advocacy (RAPA)

Stipulated Settlements

U-04-104(10), Bethel Utilities Corp (BUC).

The RCA accepted a Stipulation filed jointly by the utility and RAPA in a case involving fuel supply procurement practices by BUC. Under the Stipulation, the utility agrees to submit any future fuel supply contract to the Commission for approval. Further, as part of that tariff filing, BUC must submit all documents used as part of its fuel bid process for review. This docket is now closed.

U-05-18(3)/U-05-49(2), TDX Sand

Point/TDS North Slope Generating, Inc. The RCA accepted a Stipulation jointly filed by the utilities and RAPA in a rate case involving affiliated companies which are wholly-owned subsidiaries of TDX Native Corporation. After review of the utility's revenue requirement and the affiliated transactions between the TDX Sand Point and its affiliated fuel supplier, RAPA analysis concluded that no reduction in rates was warranted. The Commission agreed in accepting the Stipulation. The settlement also specified the fuel mark-up applicable to TDX Sand Point Fuel and imposed a restriction on TDX North Slope's ability to pay out dividends while its equity level remains below 50%. The utility is required to make additional filings.

Case Intervention

As of December, 2005, RAPA is involved in eighteen dockets before the RCA. That number

includes sixteen adjudicatory matters in which the AG/public advocate has elected to participate as a party and two rulemaking proceedings in which RAPA has offered formal Comments.

RAPA also monitors numerous matters before the RCA and provides policy analysis to the AG, and through the AG to the Governor's Office, as requested.

Most recently, RAPA filed *Comments of the Attorney General on Tariff Advice 139-4* which is an application filed by Enstar Natural Gas Co. for approval by the RCA of a gas sales agreement (GSA) with Marathon Oil Company. On behalf of the AG, RAPA asked the Commission to suspend the filing for further investigation and a hearing. If the matter is suspended, RAPA intends to participate as a party and investigate numerous aspects of the proposed agreement, including the legitimacy of using the Henry Hub Index (HHI) as a pricing proxy under the facts presented for this proposed gas supply contract.

Torts and Workers' Compensation

After extensive motion practice, a mixed common law tort / § 1983 case filed against two social workers was wholly dismissed by the trial court this month (Judge Suddock). The case arose out of a CINA proceeding. Plaintiff, the non-custodial father of the child, claimed that the social workers violated his constitutional rights because they did not place the child with him promptly and generally acted in "bad faith" during the prosecution of the CINA proceeding. Judge Suddock held that plaintiff was collaterally estopped from bringing this lawsuit because the issues he raised were litigated and decided in the underlying CINA proceeding. Judge Suddock ruled that there was no federally guaranteed constitutional right guaranteeing custody of a child during ongoing CINA proceedings. This case was defended most recently by AAG Paula Jacobsen.

In *Guerrero v. State*, a case involving a young boy severely injured when he dashed into traffic on "C" Street in Anchorage, the Supreme Court

sustained the grant of summary judgment to the state on a number of "failure to build" theories, but remanded for trial plaintiff's claims of failure to sign and warn. The Court found that the state may have a duty to sign and warn even where the relevant portions of the Alaska Traffic Manual are merely permissive. This case is being defended by AAG Venable Vermont.

In *Jones v. State*, the Supreme Court upheld a judgment in the state's favor arising from an inmate's claim that he had been fired from his inmate job by a correctional officer in a way that was racially and sexually offensive. Although the inmate actually recovered \$3,500 in the jury verdict, the inmate failed to beat the offer of judgment made by the state. After offset for Plaintiff's verdict, judgment was entered in favor of the state for approximately \$16,000 in costs and fees. This case was tried by AAG Jason Mogel prior to his return to New York City. This case is an excellent example of why making offers of judgment can yield a major strategic benefit.

The constitutionality of AS 09.50.250(5), a statute that asserts the state's sovereign immunity for claims made by state employed seamen, was upheld in a decision this month by Judge Collins of Juneau. Jesse Glover, an Alaska Marine Highway seaman, argued through counsel that the statute was invalid and further that the Legislature did not have the authority under the Alaska Constitution to enact immunity legislation asserting the state's sovereign immunity. Through operation of AS 09.50.250(5), injured state employed seamen are now included in workers' compensation benefits as are all other state employees.

Both parties moved for summary relief. In a 32 page opinion, the Court upheld both the statute and the authority of the Legislature to enact immunity statutes protecting the State. Briefing by the parties was extensive, including extensive review of the minutes of the Alaska Constitutional Convention and other legislative history. Senior AAG Susan Cox submitted extensive briefing on

these issues. She was assisted in her research on the Constitutional Convention and legislative history by Christy Blair, paralegal in the Juneau Torts section. Although Susan was in Europe visiting her daughter at the time the decision was rendered, she was able to promptly hear of her success through the wonders of the internet.

In *Helveston v. State*, an inmate filed a variety of claims alleging medical malpractice and negligent medical care. In two prior summary judgment motions, the court dismissed the majority of the claims. This month AAG Stephanie Galbraith moved for dismissal of the few remaining claims based on plaintiff's failure to exhaust his administrative remedies.

Transportation

A private developer, AGLAD, has signed a lease with the Ted Stevens Anchorage International Airport for roughly forty acres of Postmark Bog adjacent to the airport's main north-south taxiway. The lease commits AGLAD to invest at least \$25 million to develop an air cargo facility, including a 50,000 sq. ft. building and nine aircraft hardstands adequate to accommodate B-747-400 or larger aircraft. AAG John Steiner, with assistance from Chief AAG Jim Cantor, represented the airport as this project developed over the last five years.

Two condemnations related to the South Fairbanks Drainage Project have settled, although in one case the distribution of compensation awaits resolution of an IRS lien. Former AAG Jason Crawford and current AAG Leone Hatch represented DOT&PF.

A condemnation stemming from the expansion of the Parks Highway near Wasilla has settled after five years of litigation. During the course of the litigation, DOT&PF paid approximately \$1.15 million for three parcels of land. Under the final settlement, DOT&PF will pay an additional \$241,950 to resolve claims that the taking damaged the landowners' remaining property (which houses a gas station and convenience

store), and \$47,200 representing a likely award of full reasonable attorney fees. DOT&PF will also transfer approximately 11,160 sq. ft. of property to the landowners to allow them to reconfigure the gas station to mitigate damages allegedly caused by the highway project. AAG Jim Cantor, with assistance from AAG Susan Urig, represented DOT&PF.

CRIMINAL DIVISION

Anchorage DAO

Ezial Avery Convicted of Sexually Assaulting Girlfriend in Violation of Protective Order. On February 9, 2005, V.Q. obtained a domestic violence protective order against her boyfriend, Ezial Avery. After the order was served, Avery continued to go to V.Q.'s home, but she did not report him to police. On the evening of February 18, at about 8:00 p.m., Avery went to her home again. This time, he raped her, holding her overnight.

While Avery was in jail awaiting trial, he telephoned V.Q. to try to get her to change her testimony. That conversation was recorded by the jail and admitted as evidence at trial. ADA Erin White conducted the non-jury trial before Judge Larry Card.

Judge Card convicted Avery of two counts of sexual assault in the first degree, assault in the fourth degree, and violating a domestic violence protective order.

Manager of Prostitution Business Convicted of Promoting Prostitution and Drug Dealing. On February 24, 2005, a special unit of the Anchorage Police Department began an operation to investigate prostitution. An undercover officer posing as a customer went to a trailer and hired two of the women to provide sex for money. One of the prostitutes talked about getting drugs for the undercover officer. One of the prostitutes, following her arrest, agreed to cooperate with the police in order to attempt to make a case against

her pimp who supplied her and their customers with drugs. The prostitute, under police supervision and pursuant to a Glass warrant, telephoned her boss, Vui Tsen, to arrange a purchase of crack cocaine.

An undercover officer accompanied the prostitute to Tsen's residence. Police searched the prostitute prior to her going to the residence to assure she was not in possession of any drugs. Once inside Tsen's residence, Tsen provided the prostitute \$50 worth of crack that she, in turn, delivered to the officer that also was at the residence. Police recovered four grams of crack cocaine from Tsen's pockets and the buy money from his wallet.

ADA Trina Sears conducted the jury trial before Judge Phillip Volland.

Thomas McElwain Sentenced for Nearly Running over Police Officer while Speeding through Crowded Bar Parking Lot. Judge Larry Card sentenced Thomas Bertrand McElwain to a total sentence of 10 years with 3 years suspended on the class C felony offenses of assault in the third degree and felony eluding. McElwain was convicted as charged by a jury on June 8, 2005, of the offenses for nearly running over APD Officer Mark LaPorte and then fleeing the scene. Moments before, McElwain had brought a sword to the back of the Gaslight Bar at closing time, was disarmed of the sword by police and security, and then threatened to retrieve a gun from his car in order to shoot APD Sgt. Ron Tidler. Sgt. Tidler was forced to shoot the tires of McElwain's car in order to afford Officer LaPorte the opportunity to get out of the way. McElwain continued to speed through the crowded parking lot, striking a dumpster and traffic control barriers. McElwain then drove on the downtown streets in a reckless fashion, running red lights, until he was finally taken into custody. Ofc. LaPorte and Sgt. Tidler were on duty at the bar in their roles of trying to prevent sexual assaults of intoxicated victims following bar closings.

Chief ADA John Novak handled both the jury trial and sentencing hearing.

Charles Collins Sentenced to 99 Years for Murdering his Girlfriend. Judge Larry Card sentenced Charles Collins to a term of 99 years on his conviction for first degree murder. A jury convicted Collins of first degree murder for the death of his girlfriend based upon the relationship between the two, a neighbor hearing a struggle in the residence, and the forensic evidence garnered from the crime scene and autopsy.

ADA Sharon Marshall handled both the jury trial and sentencing hearing.

[Bethel DAO](#)

The Bethel office had one felony sexual assault case that covered two years between two separate assaults. The jury acquitted on two counts of burglary and one count of sexual assault I and hung on a second count of sexual assault I. We have had four misdemeanor trials: two hung juries; one conviction and one guilty to a lesser included. We held 10 grand juries and over 15 felony counts, mostly sexual assaults and assault. We are backed up in district court so the superior court will be handling trials for the next couple of weeks. We have approximately 30 trials backed-up mostly because the new PDs think pleading to DUIs and DV assaults and receiving minimum sentence does not give their clients any reason not to go to trial.

[Fairbanks DAO](#)

The Grand Jury returned 31 indictments for the first three weeks of the month in Fairbanks. The most notable case presented was a first degree murder case in which Marvin Wright was indicted for the murder of Tricia Warren in September 1995.

The oddest case was out of Tanana. The defendant was charged with stealing firearms that he was suspected of stealing and which had been retained as evidence in the original

investigation. The Tanana Police recovered firearms stolen in October from a residence in Tanana. The suspect was questioned in late November and knew that the police had the firearms. When the officer left town for a weekend in Fairbanks, the defendant shot open the door to the officer's residence, which also doubles as the police department office. The defendant entered the residence/office and took the recovered firearms. He is now facing the prospect of being charged with theft of the firearms for the original theft, as well as burglary I, theft II, tampering with evidence and misconduct involving weapons charges. The defendant is secured at the Fairbanks Correctional Center and the firearms are now secured in the AST evidence locker.

The felony unit took in 35 cases in which arrests were made. Felony assault, drug and property crimes again lead the number of referrals. Only three of the arrests this month were for felony DUI.

The misdemeanor unit was extremely busy. December saw 61 DUI arrests, 45 assault IV arrests, and 30 arrests for driving with license suspended. In addition, there were 50 miscellaneous and property misdemeanor arrests.

Juneau DAO

The Juneau DAO finished December and the year with a felony breath alcohol refusal jury trial. This was felony jury trial no. 21 for the Juneau DAO for 2005, and this during a year when Rick Svobody, senior attorney in the office, was involved in major cases in other offices (Nome and Kotzebue). It is believed that this is a record number of felony jury trials in one year in the Juneau office.

Kenai DAO

The Kenai court system is revamping itself and trying to get the public defenders to be more communicative. A bench and bar meeting was held, and committees were formed to address pretrial procedures in district and superior courts.

We have gotten a handle on the district court trials and have wended our way from a five-page list of pending trials to five pending trials. Our misdemeanor attorneys, ADA Lisa Thomas and ADA Angela Jamieson, have worked very hard to achieve this marked improvement. The defense is now in the position of actually getting a trial set when they announce that they want a trial.

A popular defense of late in several misdemeanor cases has been to have the victims or witnesses invoke their fifth-amendment rights against self-incrimination. We then either seek immunity or lose their testimony. This has arisen several times in domestic violence cases where self-defense has been raised. It arose this month in a case in which the defendant was charged with contributing to the delinquency of a minor for giving the 14 year-old girl alcohol. Although she told the officer at the scene that the defendant had given her the drinks, at the trial she invoked and was granted immunity, and nevertheless lied on the stand. The jury convicted despite her recantation.

In Homer, ADA Jean Seaton tried a strangulation assault II case under the old law. This was a case out of one of the Russian villages, so we were particularly pleased that the victim was on board, was getting a divorce, and testified truthfully. She was so compelling that the defendant pled in mid-trial.

Kotzebue/Nome DAO

2005 ended with a remarkable run of guilty verdicts out of Kotzebue: Matt Owens for murder I and evidence tampering (Senior ADA Rick Svobodny); Leroy Adams for sexual assault II (ADA Paul Roetman); Il Yang for felony bootlegging (ADA Andrea Russell); and Brandon Romane for minor consuming alcohol (ADA Paul Roetman).

Compared to Kotzebue, Nome has been relatively quiet.

Palmer DAO

On December 15, 2005, Eugene C. Gordon was convicted as charged of murder in the first degree; attempted murder in the first degree; burglary in the first degree; murder in the second degree; manslaughter; and assault in the third degree. A year ago, Gordon shot Jesus "Jessie" Manglona in the head and tried to kill ex-girlfriend Laurie Welsh after breaking into the Manglona home and finding Welsh and Manglona in bed. The jury rejected defense arguments that Gordon only intended to scare the couple and that the killing was committed in the heat of passion. (Trial attorneys: DA Roman Kalytiak and ADA Mike Perry)

On December 12, 2005, a jury convicted Donald Hodge of assault in the third degree; assault in the fourth degree; misconduct involving weapons in the fourth degree; and disorderly conduct. The felony charge involved Hodge pointing a rifle at Lt. James Helgoe of the Alaska State Troopers at a distance of approximately 50 yards. (Trial attorney: ADA Suzanne Powell)

Tariak Oviuk was sentenced to a prison term of 45 years, with 25 years suspended, and placed on probation for ten years for attempted murder and assault in the second degree. Oviuk attacked the mother of his children on January 17, 2005, by punching her, kicking her in the head, beating her head with a baseball bat, and cutting her with a box-cutter. (Trial attorney: ADA Suzanne Powell)

A Valdez jury convicted Jeffrey T. Kelly of forgery in the second degree (two counts); criminal simulation (two counts); and theft in the second degree. Kelly participated in a "Nigerian scam" by receiving two counterfeit Canadian checks in the amounts of \$30,000.00 and \$10,000.00 and cashing the \$10,000.00 check at a Valdez bank. He then spent the money as fast as he could. The jury did not buy Kelly's argument that he was merely an innocent victim of the scam. (Trial attorney: ADA Richard Allen)

In a different Valdez case, Dominic Winger pled no contest to attempted murder in the first degree. Winger stabbed his victim 14 times with a pocket knife. (Trial attorney: Rick Allen)

Glen W. Ogletree was convicted by a Palmer jury of five counts of sexual abuse of a minor in the first degree; unlawful exploitation of a minor; distribution of child pornography; possession of child pornography; burglary in the first degree and violation of a protective order for abusing the daughter of his live-in girlfriend from the time the girl was 11 years old until January of 2005, when she was 15. Ogletree downloaded hundreds of photos of child pornography, took photos of the naked child and took a photo of his face next to the child's genitals. The jury rejected defense arguments that defendant fell in love with the victim, did not have sex with the victim until she was 13 and did not have authority over the child. (Trial attorneys: DA Roman Kalytiak and ADA Mike Perry)

Matthew DeSalvo and Susan Holmes were convicted of DUI after jury trials this month in the Palmer Court. (Trial attorneys: ADA Jarom Bangerter; ADA Mike Perry)

2005 may have been the most successful year ever in terms of trials and jury verdicts for the Palmer District Attorney's Office. All of our 15 felony trials resulted in guilty verdicts, including four murder I verdicts. We also had guilty verdicts in 17 misdemeanor trials.

The Palmer office thanks everyone who helped us this year, especially Dave Burglin, Steve Wallace and Dan Cheyette. Dave was with us from April to December ("commuting" between Palmer and Fairbanks). Steve was with us on and off for significant periods of time and is currently here full-time until the spring. Dan helped us a number of weeks. We also appreciate Doug Kossler and the appellate folks being available for consultation during trials this year.

ADMINISTRATIVE SERVICES DIVISION

December was otherwise a quiet month with mostly "business as usual" in the wake of our budget submission. Work continues on the ProLaw roll out and the IT section has a couple of big projects coming down the pike in terms of network security and conversion to Microsoft under the enterprise agreement. On top of the ProLaw implementation, the section will be quite strapped.

Legislative Audit's report on the State Travel Office strongly recommends that agencies make more use of mileage to cut travel costs. We will be discussing ways to put that requirement more firmly in place so that we may take advantage of free airline tickets.

SAVE THE DATE

March 8-9, 2006 - Civil Division retreat